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ESSENTIALS OF THE LAW.

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A REVIEW

OF

BLACKSTONE'S COMMENTARIES

FOR THE USE OF

STUDENTS AT LAW.

BY

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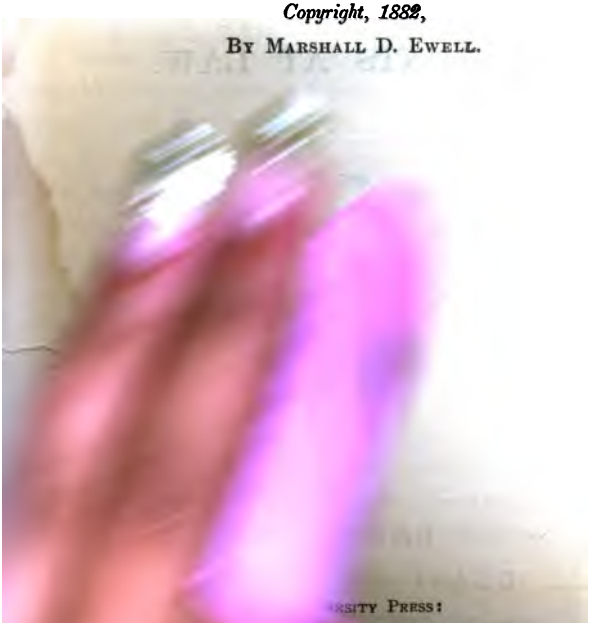

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PREFACE.

BLACKSTONE'S COMMENTARIES deservedly constitute in this country the first book of the course of legal study usually prescribed for students of the law. Probably, however, every student who reads Blackstone is embarrassed by his own inability to distinguish obsolete or unimportant matter from the vital and fundamental principles of the law, and therefore does not know what parts demand the ...t attention, in order to fix them in his memory, and ... may be dismissed with a more superficial examination. ...ject of this Abridgment is to relieve that embar... nt, and thereby to lighten his labor and economize ...ime by directing his energies to what seems most ...thy of attention. This has been attempted by elimi...ng obsolete and unimportant matter, by displaying ... principles in heavy-faced type, and by printing the ...portant parts of the text in brevier, while matte... ...or importance as a rule has been printed in nor... . Doubtless there will be some difference of opinio... what is of more and what of less importance, an...

in this respect this work only expresses the opinion of the Editor, — formed, however, after considerable experience in instructing young men just beginning the study of law. It frequently happened throughout the work that obsolete matter was so interwoven with matter of present importance that the plan indicated above could not conveniently be pursued. In such cases the obsolete matter has been indicated by the word "obsolete" inclosed within brackets. Matter merely historical has in some instances been considered so important to a proper understanding of the present state of the law as to deserve more than a passing notice; such matter has accordingly been printed in the larger type. The principal difficulty has been in deciding what to omit. A large amount of obsolete matter, and matter merely historical, explanatory, or argumentative, has been omitted, but it is believed that everything important for the student to know has been retained. As a rule, the exact language of the Author has been preserved. Sometimes, however, mere verbal changes not affecting the sense have been made, in order to economize space. Great care has been taken to make no omission or alteration that would change the meaning of the text or render that meaning obscure, and matter entirely new is in every instance inclosed within brackets, thus: [ ]. The original paging has been indicated by figures in brackets placed at the end of the first complete sentence of each page of the Author appearing in this work. The notes of the Author and of previous editors

have necessarily been omitted. To have retained them would have defeated the object of the volume. Occasionally, however, when thought necessary to explain a change in the law, to elucidate an obscure expression, or to direct attention to an authority throwing light upon the subject, a few words or a reference to an authority inclosed in brackets have been thrown into the text; but, for the reason already stated, no systematic attempt at annotation has been attempted. As Blackstone's Commentaries are perhaps the most important institutional work placed in the hands of students at law, more space has been devoted to them than will be given to any other work or subject in the series of which this forms the first volume. It is believed, however, that no more space has been given to the work of this Author than it justly deserves. To students pursuing their studies in an office, which in the majority of cases is equivalent to studying law alone, and to students in law schools when upon review or preparing for examination, it is believed that this Abridgment will prove especially serviceable; and it is principally for their use that its preparation has been undertaken. If it materially assists them in their labors its purpose will have been accomplished.

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UNION COLLEGE OF LAW OF CHICAGO,
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INTRODUCTION.

SECTION II.

OF THE NATURE OF LAWS IN GENERAL.

Law, in its most general and comprehensive sense, signifies **a rule of action**; and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational. Thus we say the laws of motion, of gravitation, of optics, or mechanics, as well as the laws of nature and of nations. And it is that rule of action which is prescribed by some superior, and which the inferior is bound to obey. [38]

But laws, in their more confined sense, denote the rules, not of action in general, but of *human* action or conduct; that is, the precepts by which man, a creature endowed with both reason and freewill, is commanded to make use of those faculties in the general regulation of his behavior. [39]

As man depends absolutely upon his Maker for everything, it is necessary that he should, in all points, conform to his Maker's will. **This will of his Maker is called the law of nature.** These [laws laid down by God] are the eternal immutable laws of good and evil, to which the Creator himself, in all his dispensations, conforms; and which he has enabled human reason to discover, so far as they are necessary for the conduct of human actions. [40] Such, among others, are these principles: that we should **live honestly** [honorably], **should hurt nobody,**

and should render to every one his due; to which three general precepts Justinian has reduced the whole doctrine of law. In consequence of the mutual connection of justice and human felicity, the Creator has not perplexed the law of nature with a multitude of abstracted rules and precepts, referring merely to the fitness or unfitness of things, but has graciously reduced the rule of obedience to this one paternal precept, "that man should pursue his own true and substantial happiness." [41] This is the foundation of what we call **ethics, or natural law.**

This law of nature, being coeval with mankind, and dictated by God himself, **is of course superior in obligation to any other.** It is binding over all the globe, in all countries, and at all times: no human laws are of any validity [*i. e.* in the forum of conscience], if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.

But, in order to apply this to the particular exigencies of each individual, it is still necessary to have recourse to reason, whose office it is to discover what the law of nature directs in every circumstance of life, by considering what method will tend the most effectually to our own substantial happiness. And if our reason were always clear and perfect, the task would be pleasant and easy; we should need no other guide but this. But every man now finds the contrary in his own experience; that his reason is corrupt, and his understanding full of ignorance and error.

This has given manifold occasion for the benign interposition of divine Providence, which hath been pleased, at sundry times and in divers manners, to discover and enforce its laws by an immediate and direct revelation. [42] The doctrines thus delivered we call **the revealed or divine law**, and they are to be found only in the holy scriptures.

Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these. There is true, a great number of indifferent points in which both the ine law and the natural leave a man at his own liberty, but which found necessary, for the benefit of society, to be restrained within in limits. And herein it is that human laws have their great-

est force and efficacy; for, with regard to such points as are not indifferent, human laws are only declaratory of, and act in subordination to, the former.

As it is impossible for the whole race of mankind to be united in one great society, they must necessarily divide into many, and form separate states, commonwealths, and nations, entirely independent of each other, and yet liable to a mutual intercourse. [43] Hence arises a third kind of law to regulate this mutual intercourse, called **"the law of nations,"** which, as none of these states will acknowledge a superiority in the other, cannot be dictated by any, but depends entirely upon the rules of natural law, or upon mutual compacts, treaties, leagues, and agreements between these several communities: in the construction also of which compacts we have no other rule to resort to, but the law of nature; being the only one to which all the communities are equally subject.

Municipal law is properly defined to be "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong." [44] [This definition will be improved by omitting the words, "commanding what is right," &c.]

And, first, **it is a rule**: not a transient, sudden order from a superior to or concerning a particular person; but something permanent, uniform, and universal. It is also called a *rule*, to distinguish it from *advice* or *counsel*, which we are at liberty to follow or not, as we see proper, and to judge upon the reasonableness or unreasonableness of the thing advised: whereas our obedience to the *law* depends not upon *our approbation*, but upon the *maker's will*. It is also called a *rule*, to distinguish it from a *compact* or *agreement;* for a compact is a promise proceeding *from* us, law is a command directed *to* us. [45]

Municipal law is also "a rule **of civil conduct.**" This distinguishes municipal law from the natural, or revealed; the former of which is the rule of *moral* conduct, and the latter not only the rule of moral conduct, but also the rule of faith.

It is likewise "a rule **prescribed.**" Because a bare re confined in the breast of the legislator, without manifesting some external sign, can never be properly a law. It is requ this resolution be notified to the people who are to obey

the manner in which this notification is to be made, i matter of very great indifference. It may be notified by universa tradition and long practice, which supposes a previous publication and is the case of the common law of England. It may be notified *viva voce*, by officers appointed for that purpose, as is done with re gard to proclamations, and such acts of parliament as are appointe to be publicly read in churches and other assemblies. [46] It ma lastly be notified by writing, printing, or the like; which is the gen eral course taken with all our acts of parliament. Yet, whatevei way is made use of, it is incumbent on the promulgators to do it in the most public and perspicuous manner; not like Caligula, whc wrote his laws in a very small character and hung them upon higl pillars, the more effectually to ensnare the people. There is still a more unreasonable method than this, which is called making o **laws ex post facto**; when after an action (indifferent in itself) is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it. [See U. S. Const., Art. I. sec. 10.] All laws should be therefore made to commence *in futuro*, and be notified before their commencement; which is implied in the term "*prescribed.*" But when this rule is in the usual manner notified, or prescribed, it is then the subject's business to be thoroughly acquainted therewith; for if **ignorance**, of what he *might* know, were admitted as a legitimate excuse, the laws would be of no effect, but might always be eluded with impunity.

But farther: municipal law is "a rule of civil conduct prescribed **by the supreme power in a state.**" For legislature, as was before observed, is the greatest act of superiority that can be exercised by one being over another. Wherefore it is requisite to the very essence of a law that it be made by the supreme power. Sovereignty and legislature are indeed convertible terms; one cannot subsist without the other.

The only true and natural foundations of society are the wants and the fears of individuals. [47] Single families formed the first natural society, among themselves; which, every day extending its limits, laid the first though imperfect rudiments of civil or political society: and when it grew too large sist with convenience in that pastoral state, wherein the patriarchs appear to red, it necessarily subdivided itself by various migrations into more. Af- ls, as agriculture increased, which employs and can maintain a much greater

number of hands, migrations became less frequent: and various tribes, which had formerly separated, reunited again; sometimes by compulsion and conquest, sometimes by accident, and sometimes perhaps by compact. But though society had not its formal beginning from any convention of individuals, actuated by their wants and their fears, yet it is the *sense* of their weakness and imperfection that *keeps* mankind together, that demonstrates the necessity of this union, and that therefore is the solid and natural foundation, as well as the cement of civil society. And this is what we mean by **the original contract of society**, which, though perhaps in no instance it has ever been formally expressed at the first institution of a state, yet in nature and reason must always be understood and implied in the very act of associating together: namely, that the whole should protect all its parts, and that every part should pay obedience to the will of the whole, or, in other words, that the community should guard the rights of each individual member, and that (in return for this protection) each individual should submit to the laws of the community; without which submission of all it was impossible that protection should be certainly extended to any. [48] For when civil society is once formed, government at the same time results of course, as necessary to preserve and to keep that society in order.

The political writers of antiquity will not allow more than **three regular forms of government**: the first, when the sovereign power is lodged in an aggregate assembly consisting of all the free members of a community, which is called a **democracy**; the second, when it is lodged in a council, composed of select members, and then it is styled an **aristocracy**; the last, when it is entrusted in the hands of a single person, and then it takes the name of a **monarchy**. [49] All other species of government, they say, are either corruptions of, or reducible to, these three.

In a democracy, where the right of making laws resides in the people at large, public virtue, or goodness of intention, is more likely to be found than either of the other qualities [wisdom and power] of government. Popular assemblies are frequently foolish in their contrivance and weak in their execution, but generally mean to do the thing that is right and just, and have always a degree of patriotism or public spirit. **In aristocracies** there is more wisdom to be found than in the other frames of government; being composed, or intended to be composed, of the most experienced citizens; but there is less honesty than in a republic, and less strength than in a monarchy. [50] **A monarchy** is indeed the most powerful of any, for, by the entire conjunction of the legislative and executive powers, all the sinews of government are knitted together and united the hand of the prince; but then there is imminent danger of his employing strength to improvident or oppressive purposes. Democracies are usually t calculated to direct the end of a law; aristocracies to invent the means b that end shall be obtained; and monarchies to carry those means into ex And the ancients had in general no idea of any other permanent form of ment but these three; for though Cicero declares himself of opinion, "*ess*

constitutam rempublicam quæ ex tribus generibus illis, regali, optimo, et populari, sit modice confusa," yet Tacitus treats this notion of a mixed government, formed out of them all, and partaking of the advantages of each, as a visionary whim, and one that, if effected, could never be lasting or secure.

But the British constitution has long remained a standing exception to the truth of this observation. For as with us the executive power of the laws is lodged in a single person, they have all the advantages of strength and despatch that are to be found in the most absolute monarchy, — and as the legislature of the kingdom is entrusted to three distinct powers, entirely independent of each other: first, the king; secondly, the lords spiritual and temporal, which is an aristocratical assembly of persons selected for their piety, their birth, their wisdom, their valor, or their property; and, thirdly, the House of Commons, *freely chosen by the people from among themselves*, which makes it a kind of democracy, — as this aggregate body, actuated by different springs and attentive to different interests, composes the British parliament and has the supreme disposal of everything, there can no inconvenience be attempted by either of the three branches but will be withstood by one of the other two, each branch being armed with a negative power sufficient to repel any innovation which it shall think inexpedient or dangerous. [51] If ever it should happen that the independence of any one of the three should be lost, or that it should become subservient to the views of either of the other two, there would soon be an end of our constitution. [52] [The House of Commons is now in the ascendency.]

As the power of making laws constitutes the supreme authority, so wherever the supreme authority in any state resides, it is the right of that authority to make laws; that is, in the words of our definition, *to prescribe the rule of civil action.* Farther, it is its *duty* likewise.

I proceed now to the latter branch of the definition: that it is a rule so prescribed, "**commanding what is right, and prohibiting what is wrong.**" [53]

Now in order to do this completely, it is first of all necessary that the boundaries of right and wrong be established and ascertained by law. And when this is once done, it will follow of course that it is likewise the business of the law, considered as a rule of civil conduct, to enforce these rights and to restrain or redress these wrongs. It remains therefore only to consider in what manner the law is said to ascertain the boundaries of right and wrong, and the methods which it takes to command the one and prohibit the other.

For this purpose **every law may be said to consist of several parts:** one *declaratory*, whereby the rights to be observed and the wrongs to be eschewed are clearly defined and laid down; another *directory*, whereby the subject is instructed and enjoined to observe those rights and to abstain from the commission of those wrongs; a third *remedial*, whereby a method is pointed out to recover a man's private rights or redress his private wrongs: to which may be added a fourth, usually termed the *sanction*, or *vindicatory* branch of the law; whereby it is signified what evil or penalty shall be incurred by such as commit any public wrongs and transgress or neglect their duty. [54]

With regard to the first of these, the **declaratory** part of the municipal law, depends not so much upon the law of revelation or of nature, as upon the wis-

dom and will of the legislator. The declaratory part of the municipal law has no force or operation at all with regard to actions that are naturally and intrinsically right or wrong. But with regard to things in themselves indifferent, the case is entirely altered. [55] These become either right or wrong, just or unjust, duties or misdemeanors, according as the municipal legislator sees proper for promoting the welfare of the society and more effectually carrying on the purposes of civil life. And sometimes, where the thing itself has its rise from the law of nature, the particular circumstances and mode of doing it become right or wrong as the laws of the land shall direct.

The **directory** stands much upon the same footing [as the declaratory]; for this virtually includes the former, the declaration being usually collected from the direction. The law that says, "Thou shalt not steal," implies a declaration that stealing is a crime. And we have seen that, in things naturally indifferent, the very essence of right and wrong depends upon the direction of the laws to do or to omit them.

The **remedial** part of a law is so necessary a consequence of the former two, that laws must be very vague and imperfect without it [56] For in vain would rights be declared, in vain directed to be observed, if there were no method of recovering and asserting those rights when wrongfully withheld or invaded. This is what we mean properly when we speak of the protection of the law.

With regard to the **sanction** of laws, or the evil that may attend the breach of public duties, it is observed that human legislators have for the most part chosen to make the sanction of their laws rather *vindicatory* than *remuneratory*, or to consist rather in punishments than in actual particular rewards. Of all the parts of a law the most effectual is the **vindicatory**. [57] The main strength and force of a law consists in the penalty annexed to it. Herein is to be found the principal obligation of human laws.

Interpretation of Laws. The fairest and most rational method to interpret the will of the legislator is by exploring his **intentions at the time when the law was made**, by *signs* the most natural and probable. [59] And these signs are either the words, the context, the subject-matter, the effects and consequence, or the spirit and reason of the law.

1. **Words** are generally to be understood in their usual and most known signification, not so much regarding the propriety of grammar as their general and popular use. **Terms of art** or technical terms must be taken according to the acceptation of the learned in each art, trade, and science.

2. If words happen to be still dubious, we may establish their meaning from the **context**, with which it may be of singular u to compare a word or a sentence whenever they are ambiguo equivocal, or intricate. [60] Thus the proeme, or **preamble** often called in to help the construction of an act of parliam

Of the same nature and use is the comparison of a law with other laws that are made by the same legislator, that have some affinity with the subject, or that expressly relate to the same point.

3. As to the **subject-matter**, words are always to be understood as having a regard thereto, for that is always supposed to be in the eye of the legislator, and all his expressions directed to that end.

4. As to the **effects and consequence**, the rule is, that where words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them.

5. But, lastly, the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the **reason and spirit** of it, or the cause which moved the legislator to enact it. [61] For when this reason ceases, the law itself ought likewise to cease with it.

From this method of interpreting laws, by the reason of them, arises what we call **equity** [by which is not meant equity or chancery jurisprudence], which is thus defined by Grotius: "The correction of that wherein the law (by reason of its universality) is deficient." For since in laws all cases cannot be foreseen or expressed, it is necessary that, when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of defining those circumstances, which (had they been foreseen) the legislator himself would have expressed. And these are the cases which, according to Grotius, "*lex non exacte definit, sed arbitrio boni viri permittit.*"

SECTION III.

OF THE LAWS OF ENGLAND.

The municipal law of England may be divided into two sorts: the *lex non scripta*, the unwritten, or common law; and the *lex scripta*, the written, or statute law. [63]

lex non scripta, or unwritten law, includes not only *gen-*

eral customs, or the common law properly so called, but also the *particular customs* of certain parts of the kingdom; and likewise those *particular laws* that are by custom observed only in certain courts and jurisdictions.

The monuments and evidences of our legal customs are **contained in the records of the several courts of justice, in books of reports and judicial decisions, and** in **the treatises of learned sages of the profession**, preserved and handed down to us from the times of highest antiquity. [64] However, I therefore style these parts of our law *leges non scriptæ*, because their original institution and authority are not set down in writing, as acts of parliament are, but they receive their binding power and the force of laws by long and immemorial usage, and by their universal reception throughout the kingdom.

This unwritten or common law is properly distinguishable into three kinds: 1. **General customs**, which are the universal rule of the whole kingdom, and form the common law in its stricter and more usual signification. [67] 2. **Particular customs**, which for the most part affect only the inhabitants of particular districts. 3. **Certain particular laws**, which by custom are adopted and used by some particular courts, of pretty general and extensive jurisdiction.

I. **As to general customs, or the common law** properly so called, this is that law by which proceedings and determinations in the king's ordinary courts of justice are guided and directed. [68] This for the most part settles the course in which lands descend by inheritance; the manner and form of acquiring and transferring property; the solemnities and obligation of contracts; the rules of expounding wills, deeds, and acts of parliament; the respective remedies of civil injuries; the several species of temporal offences, with the manner and degree of punishment; and an infinite number of minuter particulars, which diffuse themselves as extensively as the ordinary distribution of common justice requires.

These customs or maxims are to be known, and their validity determined, by the judges in the several courts of justice. [69] They are the depositaries of the laws; the living oracles who must decide in all cases of doubt, and who are boun by an oath to decide according to the law of the land.

Judicial decisions are the principal and most authoritat evidence that can be given of the existenee of such a custom shall form a part of the common law. The judgment itself and the proceedings previous thereto are carefully registered and p served, under the name of **records**, in public repositories set ap for that particular purpose; and to them frequent recourse is h when any critical question arises, in the determination of which f mer precedents may give light or assistance. **It is an esta lished rule to abide by former precedents where t same points come again in litigation.**

This rule admits of exception where the former d termination is most evidently contrary to reason; much more if it be clearly contrary to the divine law. [70] B even in such cases the subsequent judges do not pretend to make new law, but to vindicate the old one from misrepresentation. F if it be found that the former decision is manifestly absurd or unjus it is declared, not that such a sentence was *bad law*, but that it w *not law*; that is, that it is not the established custom of the realn as has been erroneously determined. The doctrine of the law the is this: that precedents and rules must be followed, unless flatl absurd or unjust; for though their reason be not obvious at firs view, yet we owe such a deference to former times as not to suppos that they acted wholly without consideration.

Reports are histories of the several cases, with a sho summary of the proceedings, which are preserved at large in th record, the arguments on both sides, and the reasons the court ga for its judgment, taken down in short notes by persons present the determination. [71] And these serve as indexes to, and also t explain, the records, which always, in matters of consequence an nicety, the judges direct to be searched. The reports are extant i a regular series from the reign of King Edward the Second inclusive and from his time to that of Henry the Eighth were taken by th prothonotaries, or chief scribes of the court, at the expense of th crown, and published *annually*, whence they are known unde the denomination of the *year books*. [72] From the reign of Henr the Eighth to the present time this task has been executed by man rivate and contemporary hands, who sometimes through haste an accuracy, sometimes through mistake and want of skill, have pub

lished very crude and imperfect (perhaps contradictory) accounts of one and the same determination. [See generally Wallace upon the Reporters.]

Besides these reporters, there are also other authors, to whom great veneration and respect is paid by the students of the common law. Such are Glanvil and Bracton, Britton and Fleta, Hengham and Littleton, Statham, Brooke, Fitzherbert, Staundforde, and Coke, with some others of ancient date, whose treatises are cited as authority, and are evidence that cases have formerly happened, in which such and such points were determined, which are now become settled and first principles.

II. **The second branch of the unwritten laws of England are particular customs, or laws, which affect only the inhabitants of particular districts.** [74]

These particular customs, or some of them, are without doubt the remains of that multitude of local customs out of which the common law, as it now stands, was collected at first by King Alfred, and afterwards by King Edgar and Edward the Confessor, each district mutually sacrificing some of its own special usages in order that the whole kingdom might enjoy the benefit of one uniform and universal system of laws. But for reasons that have been now long forgotten, particular counties, cities, towns, manors, and lordships were very early indulged with the privilege of abiding by their own customs, in contradistinction to the rest of the nation at large; which privilege is confirmed to them by several acts of parliament. Such are the customs of **gavelkind** in Kent, and some other parts of the kingdom; of **borough-English**, that a widow shall be entitled for her dower to all her husband's lands, &c. [75]

The rules relating to particular customs regard either the proof of their existence, their legality when proved, or their usual method of allowance.

First. **All private customs** (except gavelkind and borough-English, of which the law takes particular notice) **must be particularly pleaded, and as well the existence of such customs must be shown, as that the thing in dispute is within the custom alleged.** [76]

Second. When a custom is actually proved to exist, the next inquiry is into the legality of it. **To make a particular custom good, the following are necessary requisites:—**

1. **That it have been used so long that the memory of man runneth not to the contrary.**

2. **It must have been continued.** [77] Any interruption would cause a temporary ceasing; the revival gives it a new beginning, which will be within time of memory, and thereupon the custom will be void. But this must be understood with regard to an interruption of the *right*, for an interruption of the

possession only for ten or twenty years will not destroy the custom. But if th *right* be any how discontinued for a day, the custom is quite at an end.

8. It must have been peaceable and acquiesced in, not subje to contention and dispute.

4. Customs must be reasonable; or, rather, taken negatively, the must not be unreasonable.

5. Customs ought to be certain, and the maxim of law is, *id certum est quod certum reddi potest.* [78]

6. Customs, though established by consent, must be (wher established) compulsory, and not left to the option of every man whether he will use them or no.

7. Lastly, customs must be consistent with each other. One custom cannot be set up in opposition to another. For if both are really customs, then both are of equal antiquity and both established by mutual consent, which to say of contradictory customs is absurd.

Third. As to the allowance of special customs.

Customs in derogation of the common law must be construed strictly.

III. The third branch of the leges non scriptæ are those peculiar laws which by custom are adopted and used only in certain peculiar courts and jurisdictions. And by these I understand the civil and canon laws. [79]

It may seem a little improper at first view to rank these laws under the head of *leges non scriptæ*, or unwritten laws. But I do this, after the example of Sir Matthew Hale, because it is most plain that it is not on account of their being *written* laws that either the canon law or the civil law have any obligation within this kingdom, neither do their force and efficacy depend upon their own intrinsic authority, which is the case of our written laws or acts of parliament. But all the strength that either the papal or imperial laws have obtained in this realm, or indeed in any other kingdom in Europe, is only because they have been admitted and received by immemorial usage and custom in some particular cases and some particular courts; and then they form a branch of the *leges non scriptæ*, or customary laws, or else because they are in some other cases introduced by consent of parliament, and then they owe their validity to the *leges scriptæ*, or statute law. [80]

The present body of civil law was compiled and finished by Tribonian and other lawyers about the year 533. [81]

This consists of: 1. The institutes, which contain the elements or first principles of the Roman law in four books; 2. The digests or pandects in fifty books, containing the opinions and writings of eminent lawyers digested in a systematical method; 3. A new code, or collection of imperial constitutions in twelve books, the lapse of a whole century having rendered the former code of Sodosius imperfect; 4. The novels, or new constitutions, posterior in time the other books, and amounting to a supplement to the code, containing new

deaneries, which are the circuit of the archdeacon's and rural dean's jurisdiction, of whom hereafter, and every deanery is divided into **parishes.**

A **parish** is that circuit of ground which is committed to the charge of one person or vicar, or other minister having cure of souls therein.

The civil division of the territory of **England** is into **counties, of those counties into hundreds, of those hundreds into tithings or towns.** [113]

BOOK THE FIRST.

OF THE RIGHTS OF PERSONS.

CHAPTER I.

OF THE ABSOLUTE RIGHTS OF INDIVIDUALS.

The primary and principal object of the law are rights and wrongs. [122]

Rights are, however, liable to another subdivision, being either, first, those which concern and are annexed to the persons of men, and are then called *jura personarum*, or the *rights of persons*; or they are, secondly, such as a man may acquire over external objects or things unconnected with his person, which are styled *jura rerum*, or the *rights of things*. **Wrongs** also are divisible into, first, *private wrongs*, which, being an infringement merely of particular rights, concern individuals only, and are called civil injuries; and, secondly, *public wrongs*, which, being a breach of general and public rights, affect the whole community, and are called crimes and misdemeanors.

The present commentaries will consist of the four following parts: 1. *The rights of persons*, with the means whereby such rights may be either acquired or lost; 2. *The rights of things*, with the means also of acquiring and losing them; 3. *Private wrongs*, or civil injuries, with the means of redressing them by law; 4. *Public wrongs*, or crimes and misdemeanors, with the means of prevention and punishment.

First. **The rights of persons**, with the means of acquiring and losing them.

The rights of persons that are commanded to be observed by th municipal law are of two sorts: First, such as are due *from* ever citizen, which are usually called **civil duties**; and, secondly, su as belong *to* him, which is the more popular acceptation **of right** or *jura*. [123] Both may indeed be comprised in this latter divis ion; for, as all social duties are of a relative nature, at the same tim that they are due *from* one man or set of men, they must also be d *to* another. But it will be more clear and easy to consider many o them as duties required from, rather than as rights belonging to particular persons.

Persons also are divided by the law into either natural persons or artificial. Natural persons are such as the God of nature formed us; artificial are such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic.

The rights of persons considered in their natural capacities are also of two sorts, — absolute and relative. Absolute, which are such as appertain and belong to particular men merely as individuals or single persons; relative, which are incident to them as members of society and standing in various relations to each other.

By the absolute rights of individuals we mean those which are so in their primary and strictest sense, such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it. But with regard to the absolute *duties* which man is bound to perform, considered as a mere individual, it is not to be expected that any human municipal law should at all explain or enforce them. [124] For the end and intent of such laws being only to regulate the behavior of mankind, as they are members of society and stand in various relations to each other, they have consequently no concern with any other but social or relative duties. But with respect to *rights* the case is different. Human laws define and enforce as well those rights which belong to a man considered as an individual as those which belong to him considered as related to others. The principal view of human laws is, or ought ...s to be, to explain, protect, and enforce such rights as are ...e, which in themselves are few and simple, and then such

rights as are relative, which, arising from a variety of connections, will be far more numerous and more complicated. [125]

The absolute rights of man, considered as a free agent, are usually summed up in one general appellation, and denominated the natural liberty of mankind. This **natural liberty** consists properly in a power of acting as one thinks fit, without any restraint or control unless by the law of nature, — being a right inherent in us by birth, and one of the gifts of God to man at his creation, when he endued him with the faculty of free will. But every man, when he enters into society gives up a part of his natural liberty as the price of so valuable a purchase, and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws which the community has thought proper to establish. **Political, therefore, or civil liberty**, which is that of a member of society, is no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public. [See Cooley on Torts, 5, 9, 10.]

The fundamental articles of the absolute rights of every Englishman (which, taken in a political and extensive sense, are usually called their liberties) have been from time to time asserted in parliament as often as they were thought to be in danger. [127] First, by **the great charter of liberties**, which was obtained, sword in hand, from King John, and afterwards, with some alterations, confirmed in parliament by King Henry the Third, his son, — which charter contained very few new grants, but was for the most part declaratory of the principal grounds of the fundamental laws of England. [128] Afterwards by the statute called **confirmatio cartarum**, whereby the Great Charter is directed to be allowed as the common law. Next, by a multitude of subsequent corroborating statutes (Sir Edward Coke, I think, reckons thirty-two), from the First Edward to Henry the Fourth. Then, after a long interval, by **the petition of right**, which was a parliamentary declaration of the liberties of the people assented to by King Charles the First in the beginning of his reign. Then the **habeas corpus act**, passed under Charles the Second. To these succeeded **the bill of rights**, or declaration delivered by the Lords and Commons to the Prince and Princess of Orange, 13th of February, 1688, and afterwards enacted in parliament, when they bec-

king and queen. Lastly, these liberties were again asserted at the commencement of the present century in the **act of settlement**, whereby the crown was limited to his present Majesty's illustrious house.

The absolute rights of individuals may be reduced to three principal or primary articles, — the right of **personal security**, the right of **personal liberty**, and the right of **private property** [129] [to which may be added the right of **free exercise and enjoyment of religious profession and worship**, and also, in a state of society, of **freedom of speech and of the press.** — *Shars. Bl.* 140 *n.*].

I. **The right of personal security** consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.

1. **Life** is a right inherent by nature in every individual, and begins in contemplation of law as soon as an infant is able to stir in the mother's womb. For if a woman is quick with child, and by a potion or otherwise killeth it in her womb, or if any one beat her, whereby the child dieth in her body and she is delivered of a dead child, this, though not murder, was by the ancient law homicide or manslaughter. But the modern law doth not look upon this offence in quite so atrocious a light, but merely as a heinous misdemeanor. [130]

An infant in ventre sa mere, or in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy or a surrender of a copyhold estate made to it. It may have a guardian assigned to it, and it is enabled to have an estate limited to its use, and to take afterwards by such limitation as if it were then actually born.

2. **A man's limbs** (by which for the present we only understand those members which may be useful to him in fight, and the loss of which alone amounts to **mayhem** by the common law) are also the gift of the wise Creator to enable him to protect himself from external injuries in a state of nature. To these therefore he has a natural inherent right, and they cannot be wantonly destroyed or disabled without a manifest breach of civil liberty.

Both the life and limbs of a man are of such high value in the estimation of the law of England, that it pardons even homicide if

committed *se defendendo*, or in order to preserve them. If a man through fear of death or mayhem is prevailed upon to execute a deed or do any other legal act, these, though accompanied with all other the requisite solemnities, may be afterwards avoided, if forced upon him by a well-grounded apprehension of losing his life, or even his limbs, in case of his non-compliance. And the same is also a sufficient excuse for the commission of many misdemeanors. The constraint a man is under in these circumstances is called in law **duress**, of which there are two sorts: **duress of imprisonment**, where a man actually loses his liberty, of which we shall presently speak, and **duress per minas**, where the hardship is only threatened and impending, which is that we are now discoursing of. [131] Duress *per minas* is either for fear of loss of life, or else for fear of mayhem or loss of limb. And this fear must be upon sufficient reason. A fear of battery or being beaten, though never so well grounded, is no duress, neither is the fear of having one's house burned or one's goods taken away and destroyed; because in these cases, should the threat be performed, a man may have satisfaction by recovering equivalent damages, but no suitable atonement can be made for the loss of life or limb. [See, however, Ewell's Lead. Cases, 771–773, and cases cited; 14 Am. Law Reg. N. S. 201.]

These rights of life and member can only be determined by the death of the person, which was formerly accounted to be either a civil or natural death. [132]

The civil death commenced, if any man was banished or abjured the realm, by the process of the common law, or entered into religion; that is, went into a monastery and became there a monk professed: in which cases he was absolutely dead in law, and his next heir should have his estate. Since the Reformation this disability is held to be abolished, as is also the disability of banishment consequent upon abjuration, by statute 21 Jac. I. c. 28. [133]

This natural life cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow-creatures, merely upon their own authority. Yet nevertheless it may be frequently forfeited for the breach of those laws of society which are enforced by the sanction of capital punishments.

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terræ." Which words, "*aliquo modo destruatur*," include a prohibition, not only of *killing* and *maiming*, but also of *torturing*, and of every oppression by color of an illegal authority.

3. Besides those limbs and members that may be necessary to a man in order to defend himself or annoy his enemy, **the rest of his person or body is also entitled by the same natural right to security** from the corporal insults of menaces, assaults, beating, and wounding, though such insults amount not to destruction of life or member. [134]

4. **The preservation of a man's health** from such practices as may prejudice or annoy it; and

5. **The security of his reputation or good name from the arts of detraction and slander** are rights to which every man is entitled by reason and natural justice, since without these it is impossible to have the perfect enjoyment of any other advantage or right.

II. **Personal liberty consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint unless by due course of law.** This is a right strictly natural. The laws of England have never abridged it without sufficient cause, and in this kingdom it cannot ever be abridged at the mere discretion of the magistrate without the explicit permission of the laws. Here again the language of the Great Charter is, that no freeman shall be taken or imprisoned but by the lawful judgment of his equals or by the law of the land. [135]

By 31 Car. II. c. 2, commonly called the **habeas corpus act**, the methods of obtaining the writ [of *habeas corpus*] are so plainly pointed out and enforced, that, so long as this statute remains unimpeached, no subject of England can be long detained in prison, except in those cases in which the law requires and justifies such detainer. And, lest this act should be evaded by demanding unreasonable bail or sureties for the prisoner's appearance, it is declared by 1 W. and M. st. 2, c. 2, that excessive bail ought not to be required.

e confinement of the person in any wise is an im-
ment, so that the keeping a man against his will in a
house, putting him in the stocks, arresting or forcibly

detaining him in the street, is an imprisonment. [136] And the law so much discourages unlawful confinement, that if a man is under *duress of imprisonment*, which we before explained to mean a compulsion by an illegal restraint of liberty, until he seals a bond or the like, he may allege this duress, and avoid the extorted bond. But if a man be lawfully imprisoned, and, either to procure his discharge or on any other fair account, seals a bond or a deed, this is not by duress of imprisonment, and he is not at liberty to avoid it. [137] **To make imprisonment lawful**, it must either be by process from the courts of judicature or by warrant from some legal officer having authority to commit to prison, which warrant must be in writing, under the hand and *seal* of the magistrate, and express the causes of the commitment, in order to be examined into if necessary upon a *habeas corpus*. If there be no cause expressed, the jailer is not bound to detain the prisoner.

A natural and regular consequence of this personal liberty is that **every Englishman may claim a right to abide in his own country so long as he pleases**, and not to be driven from it unless by the sentence of the law. The king, indeed, by his royal prerogative, may issue out his writ **ne exeat regno**, and prohibit any of his subjects from going into foreign parts without license. But no power on earth, except the authority of parliament, can send any subject of England *out* of the land against his will — no, not even a criminal. For exile and transportation are punishments at present unknown to the common law, and wherever the latter is now inflicted it is either by the choice of the criminal himself to escape a capital punishment, or else by the express direction of some modern act of parliament. To this purpose the Great Charter declares that no freeman shall be banished unless by the judgment of his peers or by the law of the land. Though *within* the realm the king may command the attendance and service of all his liegemen, yet he cannot send any man *out of* the realm, even upon the public service, excepting sailors and soldiers, the nature of whose employment necessarily implies an exception; he cannot even constitute a man lord deputy or lieutenant of Ireland against his w nor make him a foreign ambassador. [138] For this might in ity be no more than an honorable exile.

III. **The third absolute right, inherent in every**

lishman, is that of property, which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution save only by the laws of the land. Upon this principle the Great Charter has declared that no freeman shall be disseised or divested of his freehold, or of his liberties or free customs, but by the judgment of his peers or by the law of the land. [139]

So great, moreover, is the regard of the law for private property, that it will not authorize the least violation of it, not even for the general good of the whole community. If a **new road,** for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In this and similar cases the legislature alone can, and indeed frequently does, interpose and compel the individual to acquiesce, not by absolutely stripping the subject of his property in an arbitrary manner, but by giving him a full indemnification and equivalent for the injury thereby sustained.

No subject of England can be constrained to pay any **aids or taxes,** even for the defence of the realm or the support of government, but such as are imposed by his own consent or that of his representatives in parliament. [140]

The constitution has established certain other auxiliary subordinate rights of the subject, which serve principally as outworks or barriers to protect and maintain inviolate the three great and primary rights of personal security, personal liberty, and private property. [141] These are, —

1. **The constitution, powers, and privileges of parliament.**

2. **The limitation of the king's prerogative** by bounds so certain and notorious that it is impossible he should either mistake or legally exceed them without the consent of the people.

3. **The right of applying to the courts of justice for redress of injuries.** The emphatical words of *Magna Carta,* spoken in the person of the king, who, in judgment of law (says Sir Edward Coke), is ever present and repeating them in all his courts, are these: *nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam.* "And therefore every subject," continues the

same learned author, "for injury done to him *in bonis, in terris, vel persona*, by any other subject, be he ecclesiastical or temporal, without any exception, may take his remedy by the course of the law, and have justice and right for the injury done to him freely without sale, fully without any denial, and speedily without delay."

Not only the substantial part or judicial decisions of the law, but also the formal part or method of proceeding cannot be altered but by parliament. [142] The king, it is true, may erect new courts of justice, but then they must proceed according to the old established forms of the common law.

4. **If there should happen any uncommon injury,** or infringement of the rights before mentioned, which the ordinary course of law is too defective to reach, there still remains a fourth subordinate right appertaining to every individual, namely, **the right of petitioning the king or either house of parliament for the redress of grievances.** [143] Care only must be taken lest, under the pretence of petitioning, the subject be guilty of any riot or tumult, as happened in the opening of the memorable parliament in 1640.

5. The fifth auxiliary right of the subject is that of **having arms for their defence suitable to their condition and degree, and such as are allowed by law.** [144]

CHAPTER II.

OF THE PARLIAMENT.

The most universal public relation by which men are connected together, is that of government: namely, as governors or governed; or, in other words, as magistrates and people. [146] Of magistrates, some also are *supreme*, in whom the sovereign power of the state resides; others are *subordinate*, deriving all their authority from the supreme m istrate, accountable to him for their conduct, and acting in an rior, secondary sphere.

In all tyrannical governments the supreme magistracy, or the right of both making and of enforcing the laws, is vested in one and the same man or one and the same body of men; and wherever these two powers are united together, there can be no public liberty. But where the legislative and executive authority are in distinct hands, the former will take care not to intrust the latter with so large a power as may tend to the subversion of its own independence, and therewith of the liberty of the subject. With us, therefore, **in England, this supreme power is divided into two branches: the one legislative, to wit the parliament, consisting of king, Lords, and Commons; the other executive, consisting of the king alone.** [147]

I. **As to the manner and time of assembling of parliament.** The parliament is regularly to be summoned by the king's writ or letter, issued out of chancery by advice of the privy council, at least forty [now thirty-five] days before it begins to sit. [150] It is a branch of the royal prerogative that no parliament can be convened by its own authority, or by the authority of any, except the king alone. Nor is it an exception to this rule that, by some modern statutes, on the demise of a king or queen, if there be then no parliament in being, the last parliament revives, and it is to sit again for six months, unless dissolved by the successor, for this revived parliament must have been originally summoned by the crown.

By the statute 16 Car. II. c. 1, it is enacted that the sitting and holding of parliaments shall not be intermitted above three years at the most. [153] And by the statute 1 W. and M. st. 2, c. 2, it is declared to be one of the rights of the people, that for redress of all grievances, and for the amending, strengthening, and preserving the laws, parliaments ought to be held *frequently*. And this indefinite *frequency* is again reduced to a certainty by statute 6 W. and M. c. 2, which enacts, as the statute of Charles the Second had done before, that a new parliament shall be called within three years after the determination of the former. [Owing to the fact that the mutiny act and supplies are voted for only one year, annual sessions are now necessary.]

The constituent parts of a parliament are the

king's majesty, sitting there in his royal political capacity and the three estates of the realm, the Lords Spiritual, the Lords Temporal (who sit, together with the king, in one house), and the Commons, who sit by themselves in another. And the king and these three estates together form the great corporation of body politic of the kingdom, of which the king is said to be *caput, principium, et finis.* For upon their coming together the king meets them, either in person or by representation, without which there can be no beginning of a parliament; and he also has alone the power of dissolving them.

It is highly necessary for preserving the balance of the constitution that the executive power should be a branch, though not the whole, of the legislative. [154] The total union of them would be productive of tyranny; the total disjunction of them, for the present, would in the end produce the same effects, by causing that union against which it seems to provide. The legislative would soon become tyrannical, by making continual encroachments, and gradually assuming to itself the rights of the executive power. To hinder, therefore, any such encroachments the king is himself a part of the parliament; and as this is the reason of his being so, very properly, therefore, the share of legislation, which the constitution has placed in the crown, consists in the power of *rejecting* rather than *resolving*, — this being sufficient to answer the end proposed. [This *veto* power is now obsolete.] And herein indeed consists the true excellence of the English government, that all the parts of it form a mutual check upon each other. [155] In the legislature, the people are a check upon the nobility, and the nobility a check upon the people, by the mutual privilege of rejecting what the other has resolved; while the king is a check upon both, which preserves the executive power from encroachments. And this very executive power is again checked and kept within due bounds by the two Houses, through the privilege they have of inquiring into, **impeaching**, and punishing the conduct (not indeed of the king, which would destroy his constitutional independence, but, which is more beneficial to the public) of his evil and pernicious counsellors.

[**The king's majesty** is the subject of subsequent chapters.

The Spiritual Lords consist of two archbishops and two

four bishops, and at the dissolution of monasteries by Henry VIII. consisted likewise of twenty-six mitred abbots and two priors, — a very considerable body, and in those times equal in number to the temporal nobility. But though these Lords Spiritual are in the eye of the law a distinct estate from the Lords Temporal, and are so distinguished in most of our acts of parliament, yet in practice they are usually blended together under the one name of *the Lords*. They intermix in their votes, and the majority of such intermixture joins both estates. [156] And from this want of a separate assembly and separate negative of the prelates, some writers have argued very cogently that the Lords Temporal and Spiritual are now in reality only one estate, which is unquestionably true in every effectual sense, though the ancient distinction between them still nominally continues.

The Lords Temporal consist of all the peers of the realm (the bishops not being in strictness held to be such, but merely lords of parliament), by whatever title of nobility distinguished, dukes, marquises, earls, viscounts, or barons. [157] Some of these sit by descent, as do all ancient peers; some by creation, as do all new-made ones; others, since the union with Scotland, by election, which is the case of the sixteen peers who represent the body of the Scots nobility. Their number is indefinite, and may be increased at will by the power of the crown.

The Commons consist of all such men of property in the kingdom as have not seats in the House of Lords, every one of which has a voice in parliament, either personally or by his representatives. [158] The counties are represented by knights, elected by the proprietors of lands; the citizens and boroughs are represented by citizens and burgesses, chosen by the mercantile part, or supposed trading interest of the nation. [159]

The number of English representatives is 513, and of Scots 45; in all 558 [652]. And every member, though chosen by one particular district, when elected and returned, serves for the whole realm. For the end of his coming thither is not particular, but general; not barely to advantage his constituents, but the *common* wealth. And therefore he is not bound, like a deputy in the United Provinces, to consult with or take the advice of his constituents upon any particular point, unless he himself thinks it proper or prudent so to do.

III. We are next to examine the **laws and customs relating to parliament** thus united together, and considered as one aggregate body. [160]

The power and jurisdiction of parliament is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal: this being the place where that absolute despotic power, which must in all governments reside somewhere, is intrusted by the constitution of these kingdoms. All mischiefs and grievances, operations and remedies, that transcend the ordinary course of the laws are within the reach of this extraordinary tribunal. [161] It can regulate or new model the succession to the crown; it can alter the established religion of the land; it can change and create afresh even the constitution of the kingdom and of parliaments themselves, — it can, in short, do everything that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of parliament.

The whole of the law and custom of parliament has its original from this one **maxim**, "that whatever matter arises concerning either House of parliament ought to be examined, discussed, and adjudged in that house to which it relates, and not elsewhere." [163] Hence, for instance, the Lords will not suffer the Commons to interfere in settling the election of a peer of Scotland; the Commons will not allow the Lords to judge of the election of a burgess; nor will either House permit the subordinate courts of law to examine the merits of either case.

The privileges of parliament are likewise very large and indefinite. [164] "And the determination and knowledge of that privilege belongs to the Lords of parliament, and not to the justices." Privilege of parliament was principally established in order to protect its members, not only from being molested by their fellow-subjects but also more especially from being oppressed by the power of t' crown. The dignity and independence of the two Houses are great measure preserved by keeping their privileges indefin

[These privileges are circumscribed by law and determined by precedent.] **Some, however, of the more notorious privileges** of the members of either House are privilege of speech, of person, of their domestics, and of their lands and goods.

As to the first privilege, of speech, it is declared by the statute 1 W. and M. st. 2, c. 2, as one of the liberties of the people, "that the freedom of speech and debates and proceedings in parliament ought not to be impeached or questioned in any court or place out of parliament." And this freedom of speech is particularly demanded of the king in person by the Speaker of the House of Commons at the opening of every new parliament. **So likewise are the other privileges of persons, servants, lands, and goods,** which are immunities as ancient as Edward the Confessor. [165] This included formerly not only privilege from illegal violence, but also from legal arrests, and seizures by process from the courts of law. And still, to assault by violence a member of either House, or his menial servants, is a high contempt of parliament, and there punished with the utmost severity. Neither can any member of either House be arrested and taken into custody, unless for some indictable offence, without a breach of the privilege of parliament.

But all other privileges which derogate from the common law in matters of civil right are now at an end, save only as to the freedom of the member's person, which in a peer (by the privilege of peerage) is forever sacred and inviolable, and in a commoner (by the privilege of parliament) for forty days after every prorogation and forty days before the next appointed meeting, which is now in effect as long as the parliament subsists, it seldom being prorogued for more than fourscore days at a time. All other privileges which obstruct the ordinary course of justice are now totally abolished by statute 10 Geo. III. c. 50, which enacts that any suit may at any time be brought against any peer or member of parliament, their servants, or any other person entitled to privilege of parliament, which shall not be impeached or delayed by pretence of any such privilege, except that the person of a member of the House of Commons shall not thereby be subjected to any arrest of imprisonment.

The only way by which courts of justice could

anciently take cognizance of privilege of parliament was by writ of privilege, in the nature of a supersedeas, to deliver the party out of custody when arrested in a civil suit. But since the statute 12 W. III. c. 3, which enacts that no privileged person shall be subject to arrest or imprisonment, it hath been held that such arrest is irregular ab initio, and that the party may be discharged upon motion [or on *habeas corpus*].

The claim of privilege hath been usually guarded with an exception as to the case of indictable crimes, or, as it has been frequently expressed, of treason, felony, and breach (or surety) of the peace. Whereby it seems to have been understood that no privilege was allowable to the members, their families or servants, in any *crime* whatsoever, for all crimes are treated by the law as being *contra pacem domini regis*. To which may be added that a few years ago the case of writing and publishing seditious libels was resolved by both Houses not to be entitled to privilege, and that the reasons upon which that case proceeded extended equally to every indictable offence. [167] So that the chief, if not the only, privilege of parliament in such cases seems to be the right of receiving immediate information of the imprisonment or detention of any member, with the reason for which he is detained.

IV. The laws and customs relating to the House of Lords in particular. Their judicial capacity will be more properly treated of in the third and fourth books of these Commentaries.

They have a right to be attended, and constantly are, by the judges of the Court of King's Bench and Common Pleas, and such of the Barons of the Exchequer as are of the degree of the coif, or have been made serjeants at law; as likewise by the king's learned counsel, being serjeants, and by the masters of the court of chancery, for their advice in point of law, and for the greater dignity of their proceedings. [168]

Another privilege is, that every peer, by license obtained from the king, may make another lord of parliament his proxy, to vote for him in his absence. A privilege which a member of the other House can by no means have, as he is himself but a proxy for a multitude of other people.

Each peer has also a right, by leave of the House, when a vote passes contrary to his sentiments, to enter his dissent on the journals of the House, with the reasons for such dissent, which is usuall styled his protest.

All bills, likewise, that may in their consequences any way affect the right of the peerage, are by the custom of parliament to have their first rise and beginning in the House of Peers, and to suffer no changes or amendments in the House of Commons.

V. **The peculiar laws and customs of the House of Commons** relate principally to the raising of taxes and the election of members to serve in parliament. [169]

First, with regard to taxes, it is the ancient indisputable privilege and right of the House of Commons that all grants of subsidies or parliamentary aids do begin in their House and are first bestowed by them, although their grants are not effectual to all intents and purposes until they have the assent of the other two branches of the legislature. [See U. S. Const., Art. 1, § 7.] So reasonably jealous are the commons of this valuable privilege, that herein they will not suffer the other House to exert any power but that of rejecting; they will not permit the least alteration or amendment to be made by the Lords to the mode of taxing the people by a money bill. [170]

[**With regard to the elections of knights, citizens, and burgesses** [170], the qualifications of the electors and of the persons to be elected, and the method of proceeding in elections, the student is referred, in addition to the text of our author, to 1 Broom and Hadley's Commentaries, *204 *et seq.*]

VI. **The method of making laws is much the same in both Houses,** and I shall touch it very briefly, beginning in the House of Commons. [181] For despatch of business each House of parliament has its **Speaker.** The Speaker of the House of Lords, whose office it is to preside there and manage the formality of business, is the Lord Chancellor, or Keeper of the King's Great Seal, or any other appointed by the king's commission; and if none be so appointed, the House of Lords (it is said) may elect. The Speaker of the House of Commons is chosen by the House, but must be approved by the king. And herein the usage of the two Houses differs, that the Speaker of the House of Commons cannot give his opinion or argue any question in the House [except upon committee of the whole]; but the Speaker of the House of Lords, if a lord of parliament, may.

In each House the act of the majority binds the

whole, and this majority is declared by votes openly and publicly given.

To bring a bill into the House, if the relief sought by it is of a private nature, it is first necessary to prefer a petition, which must be presented by a member, and usually sets forth the grievance desired to be remedied. This petition (when founded on facts that may be in their nature disputed) is referred to a committee of members, who examine the matter alleged, and accordingly report it to the House; and then (or otherwise, upon the mere petition) leave is given to bring in the bill. **In public matters the bill is brought in upon motion made to the House, without any petition at all.**

The persons directed to bring in the bill present it in a competent time to the House drawn out on paper, with a multitude of blanks or void spaces where anything occurs that is dubious or necessary to be settled by the parliament itself (such especially as the precise date of times, the nature and quantity of penalties, or of any sums of money to be raised), being indeed only the skeleton of the bill. [182] In the House of Lords, if the bill begins there, it is (when of a private nature) referred to two of the judges to examine and report the state of the facts alleged, to see that all necessary parties consent, and to settle all points of technical propriety. **This is read a first time, and at a convenient distance a second time;** and after each reading the Speaker opens to the House the substance of the bill, and puts the question whether it shall proceed any farther. The introduction of the bill may be originally opposed, as the bill itself may at either of the readings; and if the opposition succeeds, the bill must be dropped for that session, as it must also if opposed with success in any of the subsequent stages.

After the second reading it is committed; that is, referred to a committee, which is either selected by the House in matters of small importance, or else upon a bill of consequence the House resolves itself into a Committee of the whole House. **A Committee of the whole House** is composed of every member, and to form it the Speaker quits the chair (another member being appointed chairman), and may sit and debate as a private member. In these committees the bill is debated clause by clause, amend

ments made, the blanks filled up, and sometimes the bill entirely new modelled. **After it has gone through the committee the Chairman reports it to the House,** with such amendments as the committee have made, and then the House reconsiders the whole bill again, and the question is repeatedly put upon every clause and amendment. [183] When the House hath agreed or disagreed to the amendments of the committee, and sometimes added new amendments of its own, the bill is then ordered to be **engrossed,** or written in a strong gross hand on one or more long rolls (or presses) of parchment sewed together. When this is finished **it is read a third time,** and amendments are sometimes then made to it; and if a new clause be added, it is done by tacking a separate piece of parchment on the bill, which is called a **rider. The Speaker then again opens the contents, and, holding it up in his hands, puts the question whether the bill shall pass.** If this is agreed to, the **title** to it is then settled. **After this one of the members is directed to carry it to the Lords** and desire their concurrence, who, attended by several more, carries it to the bar of the House of Peers, and there delivers it to their Speaker, who comes down from his woolsack to receive it.

It there passes through the same forms as in the other House (except engrossing, which is already done), and if rejected no more notice is taken, but it passes *sub silentio*, to prevent unbecoming altercations. But if it is agreed to, the Lords send a message by two masters in chancery (or, upon matters of high dignity or importance, by two of the judges) that they have agreed to the same, and the bill remains with the Lords if they have made no amendment to it. **But if any amendments are made, such amendments are sent down with the bill to receive the concurrence of the Commons.** If the Commons disagree to the amendments, a **conference** usually follows between members deputed from each House, who for the most part settle and adjust the difference; but if both Houses remain inflexible the bill is dropped. **If the Commons agree to the amendments the bill is sent back to the Lords** by one of the members, with a message to acquaint them therewith. [184] The same forms are observed, *mutatis mutandis*, when the bill begins in the House of

Lords. But when an **act of grace or pardon is passed, it is** first signed by his Majesty, and then read once only in each of the Houses without any new engrossing or amendment. And when both Houses have done with any bill it always is deposited in the House of Peers to wait the royal assent, except in the case of a bill of supply, which, after receiving the concurrence of the Lords, is sent back to the House of Commons.

The royal assent may be given two ways: 1. **In person,** when the king comes to the House of Peers in his crown and royal robes, and, sending for the Commons to the bar, the titles of all the bills that have passed both Houses are read, and the king's answer is declared by the clerk of the parliament in Norman-French. 2. By the statute 33 Hen. VIII. c. 21, the king may give his assent **by letters patent under his great seal, signed with his hand,** and notified in his absence to both Houses assembled together in the high House. [185] And when the bill has received the royal assent in either of these ways it is then, and not before, a statute or act of parliament.

This statute or act is placed among the records of the kingdom, there needing no formal promulgation to give it the force of a law, because every man in England is, in judgment of law, party to the making of an act of parliament, being present thereat by his representatives. However, a copy thereof is usually printed at the king's press for the information of the whole land.

An act of parliament thus made is the exercise of the highest authority that this kingdom acknowledges upon earth. It hath power to bind every subject in the land and the dominions thereunto belonging, — nay, even the king himself if particularly named therein. And it cannot be altered, amended, dispensed with, suspended, or repealed, but in the same forms and by the same authority of parliament. [186]

VII. **An adjournment is no more than a continuance of the session from one day to another,** as the word itself signifies, and this is done by the authority of each House separat every day, and sometimes for a fortnight or a month together. the adjournment of one House is no adjournment of the other. U. S. Const., Art. I. § 3, Art. II. § 3; People v. Hatch, 33 Il

Prorogation puts an end to the session, and then such bills as are only begun and not perfected must be resumed *de novo* (if at all) in a subsequent session, whereas after an adjournment all things continue in the same state as at the time of the adjournment made, and may be proceeded on without any fresh commencement.

A prorogation is the continuance of the parliament from one session to another, as an adjournment is a continuation of the session from day to day. [187] This is done by the royal authority, expressed either by the Lord Chancellor in his Majesty's presence, or by commission from the crown, or frequently by proclamation. Both Houses are necessarily prorogued at the same time, it not being a prorogation of the House of Lords or Commons, but of the parliament. The session is never understood to be at an end until a prorogation, though unless some act be passed or some judgment given in parliament, it is in truth no session at all.

A dissolution is the civil death of the parliament, and this may be effected three ways:—

1. **By the king's will,** expressed either in person or by representation.

2. **A parliament may be dissolved by the demise of the crown.** [188] This dissolution formerly happened immediately upon the death of the reigning sovereign. But the calling a new parliament immediately on the inauguration of the successor being found inconvenient, and dangers being apprehended from having no parliament in being in case of a disputed succession, it was enacted by the statutes 7 and 8 W. III. c. 15, and 6 Anne, c. 7, that the parliament in being shall continue for six months after the death of any king or queen, unless sooner prorogued or dissolved by the successor; that if the parliament be at the time of the king's death separated by adjournment or prorogation, it shall, notwithstanding, assemble immediately; and that if no parliament is then in being, the members of the last parliament shall assemble and be again a parliament.

3. **Lastly, a parliament may be dissolved or expire by length of time.** [189] As our constitution now stands, the parliament must expire, or die a natural death, at the end of every seventh year, if not sooner dissolved by the royal prerogative.

CHAPTER III.

OF THE KING AND HIS TITLE.

The supreme executive power of these kingdoms is vested by our laws in a single person, the king or queen, for it matters not to which sex the crown descends, but the person entitled to it, whether male or female, is immediately invested with all the ensigns, rights, and prerogatives of sovereign power. [190]

The grand fundamental maxim upon which the jus coronæ, or right of succession to the throne of these kingdoms, depends, I take to be this: "that the crown is, by common law and constitutional custom, hereditary, and this in a manner peculiar to itself; but that the right of inheritance may from time to time be changed or limited by act of parliament, under which limitations the crown still continues hereditary." [191]

1. First, **it is in general hereditary,** or descendible to the next heir, on the death or demise of the last proprietor.

2. Secondly, **as to the particular mode of inheritance, it in general corresponds with the feodal path of descents,** chalked out by the common law in the succession to landed estates, yet with one or two material exceptions. [193] Among the females, the crown descends by right of primogeniture to the eldest daughter only and her issue, and not, as in common inheritances, to all the daughters at once. [194] On failure of lineal descendants, the crown goes to the next collateral relations of the late king, provided they are lineally descended from the blood royal. But herein there is no objection (as in the case of common descents) to the succession of a brother, an uncle, or other collateral relation, of the *half* blood, provided only that the one ancestor, from whom both are descended, be that from whose veins the blood royal is communicated to each. [195]

3. **The doctrine of hereditary right does by no means imply an indefeasible right to the throne.** It is unquestionably in the breast of the supreme legislative authority of this kingdom, the king and both houses of parliament, to defeat this hereditary right, and, by particular entails limitations, and provisions, to exclude the immediate heir, and vest the inheritance in any one else.

4. **But, fourthly, however, the crown may be limited transferred, it still retains its descendible quality, and comes hereditary in the wearer of it.** [196] And hence in our

the king is said never to die, in his political capacity, though, in common with other men, he is subject to mortality in his natural; because immediately upon the natural death of Henry, William, or Edward, the king survives in his successor.

CHAPTER IV.

OF THE KING'S ROYAL FAMILY.

The queen of England is either queen regent, queen consort, or queen dowager. [218]

The queen regent, regnant, or sovereign, is she who holds the crown in her own right; and such a one has the same powers, prerogatives, rights, dignities, and duties, as if she had been a king.

The queen consort is the wife of the reigning king; and she, by virtue of her marriage, is participant of divers prerogatives above other women.

And first, she is a public person, exempt and distinct from the king, and not, like other married women, so closely connected as to have lost all legal or separate existence so long as the marriage continues. For the queen is of ability to purchase lands and to convey them, to make leases, to grant copyholds, and do other acts of ownership without the concurrence of her lord, which no other married woman can do. She is also capable of taking a grant from the king, which no other wife is from her husband. The queen of England hath separate courts and offices distinct from the king's, not only in matters of ceremony, but even of law; and her attorney and solicitor general are entitled to a place within the bar of his majesty's courts, together with the king's counsel. [219] She may likewise sue and be sued alone, without joining her husband. She may also have a separate property in goods, as well as lands, and has a right to dispose of them by will. In short, she is in all legal proceedings looked upon as a feme sole, and not as a feme covert, as a single, not as a married woman.

The queen hath also many exemptions and minute prerogatives. For instance, she pays no toll, nor is she liable to any amercement in any court. But in general, unless where the law has expressely declared her exempted, she is upon the same footing with other subjects, being to all intents and purposes the king's subject, and not his equal.

But farther, though the queen is in all respects a subject, yet in point of the security of her life and person, she is put on the same footing with the king. [222] It is equally treason (by the statute 25 Edw. III.) to compass or imagine the death of our lady the king's companion, as of the king himself; and to violate, or defile the queen consort, amounts to the same high crime, as well in the person committing the fact, as in the queen herself, if consenting.

The husband of a queen regnant is her subject, and may be guilty of high treason against her; but in the instance of conjugal infidelity, he is not subjected to the same penal restrictions. [228] th

A queen dowager is the widow of the king, and as such enjoys most of the privileges belonging to her as queen consort. But it is not high treason to conspire her death or to violate her chastity, because the succession to the crown is not thereby endangered. Yet still, *pro dignitate regali*, no man can marry a queen dowager without special license from the king, on pain of forfeiting his lands and goods. But she, though an alien born, shall still be entitled to dower after the king's demise, which no other alien is. A queen dowager, when married again to a subject, doth not lose her regal dignity, as peeresses dowager do their peerage when they marry commoners.

The Prince of Wales, or heir apparent to the crown, and also his royal consort and the princess royal, or eldest daughter of the king, are likewise peculiarly regarded by the laws. For by statute 25 Edw. III. to compass or conspire the death of the former, or to violate the chastity of either of the latter, are as much high treason as to conspire the death of the king or violate the chastity of the queen.

The younger sons and daughters of the king, and other branches of the royal family who are not in the immediate line of succession, were little farther regarded by the ancient law than to give them to a certain degree precedence before all peers and public officers, as well ecclesiastical as temporal. [224] In 1718, upon a question referred to all the judges by King George I., it was resolved, by the opinion of ten against the other two, that the education and care of all the king's grandchildren while minors did belong of right to his Majesty, as king of this realm, even during their father's life. [225] But they all agreed that the care and approbation of their marriages, when grown up, belonged to the king their grandfather. And the judges have more recently concurred in opinion that this care and approbation extend also to the presumptive heir of the crown; though to what other branches of the royal family the same did extend, they did not find precisely determined. The most frequent instances of the crown's interposition go no farther than nephews and nieces; but examples are not wanting of its reaching to more distant collaterals. [226]

CHAPTER V.

OF THE COUNCILS BELONGING TO THE KING.

1. **The first of these is the high court of parliament,** whereof we have already treated at large. [227]

2. **Secondly, the peers of the realm are by their birth hereditary counselors of the crown,** and may be called together by the k to impart their advice in all matters of importance to the realm, either in th parliament or (which hath been their principal use) when there is no parlia in being. [Obsolete.]

Besides this general meeting, it is usually looked upon to be the right of

particular peer of the realm to demand an audience of the king, and to lay before him with decency and respect such matters as he shall judge of importance to the public weal. [228]

3. **A third council belonging to the king are, according to Sir Edward Coke, his judges of the courts of law for law matters.** [229]

4. **But the principal council belonging to the king is his privy council,** which is generally called by way of eminence *the council*. And this is a noble, honorable, and reverend assembly of the king and such as he wills to be of his privy council in the king's court or palace. The king's will is the sole constituent of a privy counselor, and this also regulates their number. Privy counselors are *made* by the king's nomination without either patent or grant, and on taking the necessary oaths they become immediately privy counselors during the life of the king that chooses them, but subject to removal at his discretion. [230]

[As to the qualifications, duty, functions, power, and privileges of the privy council, the student is referred to 1 Broom & Hadley's Commentaries, *272 *et seq.*, and to the English statutes upon the subject passed since the time of our author.]

The dissolution of the privy council depends upon the king's pleasure, and he may, whenever he thinks proper, discharge any particular member, or the whole of it, and appoint another. [232] By the common law, also, it was dissolved *ipso facto* by the king's demise, as deriving all its authority from him. But now, to prevent the inconveniences of having no council in being at the accession of a new prince, it is enacted by statute 6 Anne, c. 7, that the privy council shall continue for six months after the demise of the crown, unless sooner determined by the successor.

CHAPTER VI.

OF THE KING'S DUTIES.

The principal duty of the king is to govern his people according to law. [233]

As to the terms of the original contract between king and people, these I apprehend to be now couched in the **coronation oath,** which by the statute 1 W. and M. st. 1, c. 6, is to be administered to every king and queen who shall succeed to the imperial crown of these realms by one of the archbishops or bishops of the realm in the presence of all the people, who on their parts do reciprocally take the oath of allegiance to the Crown. [235] This coronation oath is conceived in the following terms: —

The archbishop or bishop shall say: "Will you solemnly promise and swear to govern the people of this kingdom of England and the dominions thereto belonging according to the statutes in parliament agreed on and the laws and customs

of the same?" *The king or queen shall say:* "I solemnly promise so to do."—*Archbishop or bishop.* "Will you to your power cause law and justice in mercy to be executed in all your judgments?"—*King or queen.* "I will."—*Archbishop or bishop.* "Will you to the utmost of your power maintain the laws of God, the true profession of the gospel, and the Protestant Reformed religion established by the law? And will you preserve unto the bishops and clergy of this realm, and to the churches committed to their charge, all such rights and privileges as by law do or shall appertain unto them or any of them?"—*King or queen.* "All this I promise to do." *After this the king or queen, laying his or her hand upon the holy gospels, shall say:* "The things which I have here before promised I will perform and keep, so help me God," *and then shall kiss the book.*

CHAPTER VII.

OF THE KING'S PREROGATIVE.

By the word prerogative we usually understand that special pre-eminence which the king hath over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity. It signifies in its etymology (from *præ* and *rogo*) something that is required or demanded before or in preference to all others. [239]

Prerogatives are either direct or incidental. The direct are such positive, substantial parts of the royal character and authority as are rooted in and spring from the king's political person, considered merely by itself, without reference to any other extrinsic circumstance, as the right of sending ambassadors, of creating peers, and of making war or peace. [240] But such prerogatives as are incidental bear always a relation to something else distinct from the king's person, and are indeed only exceptions in favor of the crown to those general rules that are established for the rest of the community, such as that no costs shall be recovered against the king; that the king can never be a joint-tenant; and that his debt shall be preferred before a debt to any of his subjects. We will at present only dwell upon the king's substantive or direct prerogatives.

These substantive or direct prerogatives may again be divided into three kinds: being such as regard, first, **the king's royal character;** secondly, **his royal authority;** and lastly, **his royal income.** These are necessary to secure reverence to his person, obedience to his commands, and an affluent supply for the ordinary expenses of government.

In the present chapter we shall only consider the two first of these divisions, which relate to the king's political *character* and *authority;* or, in other words, his *dignity* and regal *power;* to which last the name of prerogative is frequently narrowed and confined. [241]

First, then, of the royal dignity.

I. And first, the law ascribes to the king the attribute of sovereignty, or pre-eminence.

Hence it is that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power. [242]

Hence it is likewise, that by law the person of the king is sacred, even though the measures pursued in his reign be completely tyrannical and arbitrary, for no jurisdiction upon earth has power to try him in a criminal way, much less to condemn him to punishment.

Are then, it may be asked, the subjects of England totally destitute of remedy in case the crown should invade their rights, either by private injuries or public oppressions? [243] To this we may answer, that the law has provided a remedy in both cases.

And first, as to private injuries: if any person has, in point of property, a just demand upon the king, he must petition him in his court of chancery, where his chancellor will administer right as a matter of grace, though not upon compulsion.

Next, as to cases of ordinary public oppression, where the vitals of the constitution are not attacked, the law hath also assigned a remedy. [244] For as a king cannot misuse his power without the advice of evil counsellors, and the assistance of wicked ministers, these men may be examined and punished. The constitution has therefore provided, by means of **indictments** and **parliamentary impeachments,** that no man shall dare to assist the crown in contradiction to the laws of the land. The supposition of *law* is, that neither the king nor either house of parliament, collectively taken, is capable of doing any wrong, since in such cases the law feels itself incapable of furnishing any adequate remedy. [245] For which reason all oppressions which may happen to spring from any branch of the sovereign power must necessarily be out of the reach of any *stated rule* or *express legal* provision; but if ever they unfortunately happen, the prudence of the times must provide new remedies upon new emergencies.

II. **Besides the attribute of sovereignty, the law also ascribes to the king, in his political capacity, absolute perfection.** [246] **The king can do no wrong:** which ancient and fundamental maxim is not to be understood as if everything transacted by the government was of course just and lawful, but means only two things. First, that whatever is exceptionable in the conduct of public affairs is not to be imputed to the king, nor is he answerable for it personally to his people. And, secondly, it means that the prerogative of the crown extends not to do any injury, it is created for the benefit of the people, and therefore cannot be exerted to their prejudice.

The king, moreover, is not only incapable of doing wrong, but even of thinking wrong; he can never mean to do an improper
g; in him is no folly or weakness. And, therefore, if the crown should be
ed to grant any franchise or privilege to a subject contrary to reason, or in
ise prejudicial to the commonwealth or a private person, the law will not
e the king to have meant either an unwise or an injurious action, but
s that the king was deceived in his grant, and thereupon such grant is

rendered void, merely upon the foundation of fraud and deception, either by or upon those agents whom the crown has thought proper to employ.

In farther pursuance of this principle, the law also determines that **in the king can be no negligence** or *laches*, and therefore no delay will bar his right. *Nullum tempus occurrit regi* has been the standing maxim upon all occasions.

In the king also can be no stain or corruption of blood; for if the heir to the crown were attainted of treason or felony, and afterwards the crown should descend to him, this would purge the attainder *ipso facto*. [248] **Neither can the king in judgment of law, as king, ever be a minor or under age,** and therefore his royal grants and assents to acts of parliament are good, though he has not in his natural capacity attained the legal age of twenty-one. It hath also been usually thought prudent, when the heir apparent has been very young, to appoint a **protector, guardian, or regent** for a limited time. But the very necessity of such extraordinary provision is sufficient to demonstrate the truth of that maxim of the common law, that in the king is no minority, and therefore he hath no legal guardian.

III. **A third attribute of the king's majesty is his perpetuity.** The law ascribes to him in his political capacity an absolute immortality. The king never dies. [249] Henry, Edward, or George may die, but the king survives them all. For immediately upon the decease of the reigning prince in his natural capacity, his kingship or imperial dignity, by act of law, without any *interregnum* or interval, is vested at once in his heir, who is, *eo instanti*, king to all intents and purposes.

We are next to consider those branches of the royal prerogative which invest thus our sovereign lord, thus all-perfect and immortal in his kingly capacity, with a number of authorities and powers, in the exertion whereof consists the **executive part of government.** [250] The king of England is not only the chief, but properly the **sole, magistrate of the nation,** all others acting by commission from and in due subordination to him. In the exertion of lawful prerogative the king is and ought to be **absolute;** that is, so far absolute that there is no legal authority that can either delay or resist him. He may reject what bills [now obsolete], may make what treaties, may coin what money, may create what peers, may pardon what offences he pleases, unless where the constitution hath expressly, or by evident consequence, laid down some exception or boundary, declaring that thus far the prerogative shall go, and no farther.

In the exertion, therefore, of those prerogatives which the law has given, the king is irresistible and absolute, according to the forms of the constitution. And yet, if the consequence of that exertion be manifestly to the grievance or dishonor of the kingdom, the parliament will call his advisers to a just and severe account. [252]

The prerogatives of the crown (in the sense under which we now considering them) respect either this nation's intercourse foreign nations, or its own domestic government and civil polit

With regard to foreign concerns, the king is the delegate or representative of his people. What is done by the royal authority, with regard to foreign powers, is the act of the whole nation; what is done without the king's concurrence is the act only of private men.

I. **The king, therefore, considered as the representative of his people, has the sole power of sending ambassadors to foreign states and receiving ambassadors at home.** [253]

The rights, the powers, the duties, and the privileges of ambassadors are determined by the law of nature and nations, and not by any municipal constitutions. For, as they represent the persons of their respective masters, who owe no subjection to any laws but those of their own country, their actions are not subject to the control of the private law of that state wherein they are appointed to reside. If they grossly offend, or make an ill use of their character, they may be sent home and accused before their master, who is bound either to do justice upon them or avow himself the accomplice of their crimes. As to whether this exemption of ambassadors extends to all crimes, as well natural as positive, or whether it only extends to such as are *mala prohibita*, as coining, and not to those that are *mala in se*, as murder, the general practice of this country, as well as of the rest of Europe, seems now to be, that the security of ambassadors is of more importance than the punishment of a particular crime. [254]

In respect to civil suits, all the foreign jurists agree that neither an ambassador, nor any of his train or *comites*, can be prosecuted for any debt or contract in the courts of that kingdom wherein he is sent to reside.

II. **It is also the king's prerogative to make treaties, leagues, and alliances with foreign states and princes.** [257] For it is by the law of nations essential to the goodness of a league that it be made by the sovereign power, and then it is binding upon the whole community; and in England the sovereign power, *quoad hoc*, is vested in the person of the king.

III. **Upon the same principle the king has also the sole prerogative of** making war and peace. So that, in order to make a war completely effectual, it is necessary with us in England

that it be publicly declared and duly proclaimed by the king's authority; and then all parts of both the contending nations, from the highest to the lowest, are bound by it. [258] And wherever the right resides of beginning a national war, there also must reside the right of ending it, or the power of making peace.

IV. But as the delay of making war may sometimes be detrimental to individuals who have suffered by depredations from foreign potentates, our laws have in some respects armed the subject with powers to impel the prerogative, by directing the ministers of the crown to issue **letters of marque and reprisal** upon due demand, the prerogative of granting which is nearly related to, and plainly derived from, that other of making war, — this being indeed only an incomplete state of hostilities, and generally ending in a formal declaration of war. These letters are grantable by the law of nations whenever the subjects of one state are oppressed and injured by those of another, and justice is denied by that state to which the oppressor belongs. In this case letters of marque and reprisal (words used as synonymous, and signifying, the latter a taking in return, the former the passing the frontiers in order to such taking) may be obtained, in order to seize the bodies or goods of the subjects of the offending state, until satisfaction be made, wherever they happen to be found. [259] [By the Const. of the U. S., Art. 1, § 10, no State shall grant letters of marque and reprisal. This power is vested in Congress, Art. 1, § 8.]

V. **Upon exactly the same reason stands the prerogative of granting safe-conducts,** without which by the law of nations no member of one society has a right to intrude into another. It is left in the power of all states to take such measures about the admission of strangers as they think convenient, those being ever excepted who are driven on the coasts by necessity, or by any cause that deserves pity or compassion. Great tenderness is shown by our laws, not only to foreigners in distress, but with regard also to the admission of strangers who come spontaneously. For so long as their nation continues at peace with ours, and they themselves behave peaceably, they are under the king's protection, though liable to be sent home whenever the king sees occasion. [260] But no subject of a nation at war with us can, by the law of nations, come into the realm, nor can travel himself upon the high seas, or send his goods and merchandise from one place to another, without danger of being seized by our subjects, unless he has letters of safe-conduct, which by divers ancient statutes must be granted under the king's great seal and enrolled in chancery, or else are of no effect, the king being supposed the best judge of such emergencies as may deserve exception from the general law of arms. But **passports** under the king's sign-manual, or **licenses from his ambassadors abroad,** are now more usually obtained, and are allowed to be of equal validity.

These are the principal prerogatives of the king respecting this nation's intercourse with foreign nations. But in domestic affairs he is considered in a great variety of characters, and from thence there arises an abundant number of other prerogatives.

I. **First, he is a constituent part of the supreme legisla-**